Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	
IMPLEMENTATION OF THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992	MM Docket No. 92-259

REPLY COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC INC. AND SESAC, INC.

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. ("SESAC") submit these Reply Comments in response to the Notice of Proposed Rulemaking (FCC 92-499) in this proceeding.

I. ASCAP, BMI AND SESAC AND THEIR INTEREST IN THIS PROCEEDING

ASCAP, BMI and SESAC are "performing rights societies" as defined in the Copyright Act, 17 U.S.C. § 116(e)(3). We represent writers and publishers of copyrighted musical compositions, and license, on a nonexclusive basis, the right of nondramatic public performance in copyrighted musical compositions on behalf

of our members and affiliates. Further, by virtue of affiliation agreements with foreign performing rights societies, we license the nondramatic performing rights of foreign writers and publishers in the United States.

Our licensees include commercial and noncommercial television and radio stations and networks, cable program services, and cable system operators. In addition, we have been claimants under the cable and satellite carrier compulsory licenses in every proceeding before the Copyright Royalty Tribunal for the distribution of royalties and the adjustment of rates. Accordingly, the tens of thousands of writers and publishers we represent have a direct interest in the outcome of this proceeding, and particularly in the implementation of the retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act").

II. LICENSORS OF COPYRIGHTED WORKS MUST BE FREE TO CONTRACT WITH THEIR LICENSEES CONCERNING RETRANSMISSION CONSENT

We share the views of many who filed Comments, in that we believe that the language of the Act is unequivocal in allowing copyright owners complete freedom to contract with their broadcast station licensees regarding retransmission consent. We therefore generally support the

views of the Motion Picture Association of America, Inc., Time Warner Entertainment Co., L.P., the National Basketball Association and National Hockey League, and Fox, Inc., and oppose the views of the National Cable Television Association, Inc. ("NCTA"), National Association of Broadcasters ("NAB"), Newhouse Broadcasting Corp. ("Newhouse"), Tribune Broadcasting Co. ("Tribune"), Primetime 24 and Association of Independent Television Stations, Inc., ("INTV") on this issue.

We make the following points in reply to the arguments advanced by those with whom we disagree.

A. The Act Gives Copyright Owners the Right to Authorize Retransmission Consent by Contract Law, Not Copyright Law

The NAB argues that, because the cable compulsory license allows cable operators to retransmit copyrighted works without the consent of the copyright owners, copyright owners have lost the right to authorize or withhold authorization of such carriage as a matter of copyright law. They say:

> [The stations] own the copyright in programs they produce, programs of which they are the relevant exclusive licensees, and the compilation or collective work represented by their entire broadcast day.[1/] But just like the copyright

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1/ We note for the record that the stations do not own any copyright in any compilation or collective work which includes the copyrighted musical works we license, as our (continued...)

> owners of all the other programs they broadcast (including syndicated programs, sports programs and music), stations lost the right, as a matter of *copyright* law, to authorize -- or refuse to authorize -- cable carriage of their copyrighted works pursuant to the compulsory license in Section 111 of the Copyright Act.

NAB Comments at 52, n. 51 (emphasis in original).

The stations are, of course, correct in that statement to the degree that, as cable operators are authorized by the compulsory license to retransmit broadcast signals carrying copyrighted works, they do not need the permission of the copyright owners to do so. Indeed, that fact is confirmed by the language of Section 325(b)(6) of the Act that: "Nothing in this section shall be construed as modifying the compulsory copyright license established in Section 111 of Title 17, United States Code . . . ." The point, however is totally irrelevant to the issue before the Commission.

The question is not whether copyright owners may, as a matter of <u>copyright</u> law, limit the stations' grant of retransmission consent. The answer to that question would be that they cannot, pursuant to Section 111 of the Copyright Act and the above-quoted provision of Section 325(b)(6) of the Act.

[1/](...continued)
licenses with the stations do not authorize them to make any copyrightable derivative or collective work or compilation incorporating that music.

Rather, the question is whether anyone, including copyright owners, may limit the stations' grant of retransmission consent as a matter of contract law. The answer is clearly "yes."[2/] That is the plain meaning of the second proviso of Section 325(b)(6) of the Act: "Nothing in this section shall be construed as . . . affecting existing or future video programming licensing agreements between broadcasting stations and video programmers."

The distinction between copyright and contract law may be readily seen in the case of a program supplier who owns the only extant copy of a motion picture which is in the public domain and thus not protected by copyright. If a station wishes to broadcast that motion picture, it must obtain the copy from that supplier, and so must enter into an agreement with that supplier. But the agreement will not be a copyright license, for there is no copyright to license. Certainly, that supplier is free to enter into any contract it may negotiate with the station, including one barring the granting of retransmission consent, as there is no possible "conflict" with the compulsory

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[2/] A close reading of NAB's comments on "Program Exhibition Rights and Retransmission Consent" (at pp. 51-54) discloses that NAB nowhere addresses the question whether a copyright owner may agree with a station that the station withhold retransmission consent. That omission was, we think, deliberate.

copyright license. Is there any reason for that supplier, who does not own a copyright, to have greater rights than those who do? The answer is "no."

Indeed, we submit that Congress intended to draw a distinction between the rights of suppliers vis-a-vis cable operators under copyright law, and their rights vis-a-vis stations under contract law, in enacting Section 326(b)(6) of the Act. That distinction allows the reconciliation of the two parts of the Section's proviso.

B. The Cable Compulsory License Is Not Nullified by Allowing Freedom to Contract Regarding Retransmission Consent -- to the Contrary, It (or a Voluntary Copyright License) Remains a Necessity

Some comments state or imply that allowing copyright owners freedom to contract with stations concerning the exercise of retransmission consent would somehow nullify or eviscerate the compulsory copyright license. Comments of NCTA at 38; Newhouse Broadcasting Corp. at 9, 12-13; Primetime 24 at 12-13; INTV at 21.

That argument is simply wrong. Some form of copyright license remains a necessity for cable operators who are granted retransmission consent, irrespective of whether that grant has been affected by agreements between

the stations and copyright owners. Under current law, the compulsory license fills that need.[3/]

Whatever the arrangements may be between copyright owners and stations regarding the stations' grant of retransmission consent, it is safe to predict that those arrangements will not include a license by the copyright owners granting cable operators the right to perform the copyrighted works being licensed to the stations. The compulsory license (or, if the compulsory license is repealed, other licensing agreements between cable operators and copyright owners) will provide that authorization.

Thus, the interplay between the agreements between copyright owners and stations affecting retransmission consent on the one hand, and the compulsory copyright license on the other, is simple to describe:

1. Copyright owners may agree with stations as a matter of contract as to whether, and under what conditions, retransmission consent will be granted. If the

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[3/] As the Commission is undoubtedly aware, we have opposed the compulsory license from its inception. Whatever justification existed for it in 1976 (and we think there was none) did not then apply to our licensing of music, which was and is readily accomplished in the free market. And whatever justification existed for the compulsory license for any copyright owner in 1976 (and, again, we think there was none) certainly no longer exists in light of the economic maturity of the cable industry.

copyright owners wish to bar retransmission consent entirely and the stations agree, that is what will happen. If the copyright owners are willing to allow retransmission consent, but only under conditions to which the stations agree (such as payment of compensation), then that is what will happen. And if the copyright owners do not wish to have their agreements with the stations affect retransmission consent at all, then that is what will happen. In all circumstances, copyright owners and stations have complete freedom to negotiate whatever terms they can agree upon as affect retransmission consent. This is what the "freedom to contract" proviso of Section 325(b)(6) of the Act requires.

2. Should retransmission consent be granted by the stations, under any of the scenarios envisioned above (or any others), then the copyright license which the cable operators need to retransmit the broadcasts will be granted by the cable compulsory license. This is what the "nonmodification of section 111" proviso of Section 325(b)(6) of the Act requires.

In sum, then, the two provisos of Section 325(b)(6) of the Act can coexist harmoniously, if one is seen as dealing with the copyright owner-station relationship and the other with the copyright owner-cable

operator relationship. There is then no nullification of one by the other.

C. Nothing in the Act Makes Retransmission Consent Inalienable

NCTA suggests that, under the language of the Act, "program suppliers -- either network or syndicators -- may not restrict a station's ability to authorize the retransmission of its signal by cable systems." (NCTA Comments, at 39.) INTV suggests that "the Commission should declare a broadcast licensee's right to elect and grant retransmission consent inalienable." (INTV Comments, at 18.) These suggestions are remarkable, in that there is absolutely nothing in the Act, its legislative history, or the powers conferred upon the Commission, to warrant or allow such conclusion or "declaration." As we have shown, the premise underlying the suggestions -- that to allow such a restriction by contract would confer some "right" on copyright owners which they do not have -- is simply wrong.

Most remarkable of all are those commentators who would read the "freedom of contract" proviso out of Section 325(b)(6) in its entirety.[4/] They say that Congress "chose to give the retransmission right . . . to stations, and not to copyright owners, networks, syndication, owners of television commercials, AFTRA, ASCAP, BMI or professional

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[4/] See, e.g., Tribune Comments.

sports teams . . . ." (id. at 10). They note that many existing contracts have provisions affecting retransmission consent (id. at 11). And thus, they conclude, "[t]he Commission should declare contract clauses of this sort ineffective . . . . [and] rule that no program supplier, nor any other owner of rights in individual programs, can limit or impair a station's exclusive statutory right to grant retransmission consent . . . ." (id. at 12). These arguments are shot through with fallacies.

First, it is of course true that Congress gave the retransmission consent right to stations, and not to others. But that does not mean that the stations are free to exercise it in any way that they see fit, notwithstanding laws or agreements to the contrary. Congress also gave the stations the right to broadcast, but they cannot broadcast whatever programs they want -- they may only broadcast programs for which they acquire licenses, and only pursuant to the terms of those licenses.

Second, the fact that many existing contracts have provisions affecting retransmission consent demonstrates only that some suppliers were farsighted, and that arms-length bargaining resulted in such provisions.

Third, and most important, Section 325(b)(6) of the Act means what it says: that existing or future agreements are unaffected by the Act. The comments try to

dodge that plain language through all sorts of locutions -- it is "not completely clear," is "less clear," "could be construed" to apply to certain parties but "it is not at all clear" that it applies to others (id. at 13-14). And, in a reading which turns the statute on its head, they conclude that the Section 325(b)(6) language that the Act shall not be construed as affecting existing and future agreements means just the opposite -- that the Commission should declare all such agreements "ineffective" and preclude them in the future.

Section 325(b)(6) of the Act means what it says: Copyright owners and stations may make whatever agreements they mutually desire regarding the exercise of retransmission consent.

III. CONTRACTUAL INTERPRETATION IS A MATTER FOR THE COURTS, NOT THE COMMISSION

We wish to support and stress what the Motion Picture Association of America, Inc. has noted: The Commission should not undertake to interpret existing contracts or to regulate the language of future agreements. Such contractual interpretation is properly the province of the courts.[5/]

[5/] Indeed, even NAB seems to agree. See, NAB Comments at 53, n. 53.

IV. RETRANSMISSION CONSENT DOES NOT APPLY TO RADIO STATIONS

We agree with Time Warner's analysis (Comments at 36-38): Section 325(b) of the Act does not apply to radio stations.

Respectfully submitted,

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